

MARK J. YOUNG
Fla. Bar No. 0078158
Pro Hac Vice
myoungpa@gmail.com
MARK YOUNG, P.A.
1638 Camden Avenue
Jacksonville, FL 32207
Tel.: 904-996-8099
Fax: 904-980-9234

Attorney for Oceanic Production
Equipment, Ltd.

James E. Doroshow (SBN 112,920)
jdoroshow@foxrothschild.com
Ashe Puri (SBN 297,814)
apuri@foxrothschild.com
FOX ROTHSCHILD LLP
10250 Constellation Blvd., Suite 900
Los Angeles, CA 90067
Tel. (310) 598-4150

Attorneys for Defendants Oppenheimer Cine Rental, LLC,
Oppenheimer Camera Products, Inc., and Marty Oppenheimer

David A. Peck
SBN 171854
Coast Law Group LLP
1140 South Coast Highway 101
Encinitas, California 92024
Tel. 760.942.8505 x108
Fax 760.942.8515
Email dpeck@coastlawgroup.com

Attorney for Oceanic Production
Equipment, Ltd.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

VOICE INTERNATIONAL, INC., a
California corporation; DAVID
GROBER, an individual,

Plaintiffs,

vs.

OPPENHEIMER CINE RENTAL,
LLC, a Washington corporation;
OPPENHEIMER CAMERA
PRODUCTS, INC., a Washington
corporation; MARTY OPPENHEIMER,
an individual; JORDAN KLEIN, SR.,
an individual; JORDAN KLEIN, JR., an
individual; JOHN DANN, an individual;
Mako Products, an unknown entity,
Oceanic Production Equipment, Ltd., a
Bahamian company; and DOES 1-10,
inclusive,

Defendants.

Case No. 2:15-cv-08830-JAK-KS

*The Honorable John A. Kronstadt,
Courtroom 750*

**DEFENDANTS' CONTENTIONS OF
LAW AND FACT**

TABLE OF CONTENTS

1		
2		
3	I. NONINFRINGEMENT.....	6
4	A. Contentions of Fact.....	6
5	B. Contentions of Law.....	8
6	II. RES JUDICATA.....	9
7	A. Contentions of Fact.....	9
8	B. Contentions of Law.....	11
9	1. Collateral Estoppel.....	11
10	2. Kessler Doctrine.....	13
11	III. INVALIDITY FOR LACK OF WRITTEN DESCRIPTION AND LACK OF	
12	ENABLEMENT OF THE CONTROL SYSTEM.....	16
13	A. Contentions of Fact.....	16
14	B. Contentions of Law.....	17
15	IV. INVALIDITY OF EVERY PRODUCT CLAIM FOR INDEFINITENESS...18	
16	A. Contentions of Fact.....	18
17	B. Contentions of Law.....	18
18	V. INVALIDITY OF EVERY METHOD CLAIM FOR LACK OF WRITTEN	
19	DESCRIPTION OF INFORMATION COLLECTION.....	19
20	A. Contentions of Fact.....	19
21	B. Contentions of Law.....	19
22	VI. INVALIDITY OF EVERY METHOD CLAIM FOR LACK OF WRITTEN	
23	DESCRIPTION OF SELF CORRECTING.....	19
24	A. Contentions of Fact.....	19
25	B. Contentions of Law.....	19
26	VII. INVALIDITY OF EVERY ASSERTED CLAIM UNDER 35 USC 102, 103	
27	20
28	A. The ‘662 Patent is Not Entitled to Priority of the Provisional Application...20	
	1. Contentions of Fact.....	20

1	a. Control System.....	20
2	b. Methods.....	20
3	2. Contentions of Law.....	20
4	B. Invalidity for Anticipation and/or Obviousness.....	21
5	1. Contentions of Fact and Law.....	21
6	VIII. ALTER EGO LIABILITY DOES NOT APPLY.....	24
7	A. Contentions of Fact.....	24
8	B. Contentions of Law.....	25
9		
10	IX. DAMAGES.....	25
11	A. Contentions of Fact.....	25
12	B. Contentions of Law.....	25
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

1		
2	Adaptix, Inc. v. Amazon.com, Inc., 2015 U.S. Dist. Lexis 111933 (ND Cal. 2015)	
3	15
4	Adaptix, Inc. v. Amazon.com, Inc., 2016 U.S. Dist. Lexis 33521 (ND Cal. 2016)	15
5	Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 842, 26 Cal.	
6	Rptr. 806 (1962).....	26
7	Biomedino, LLC v. Waters Techs. Corp., 490 F.3d 946, 950 (Fed. Cir. 2007).....	20
8	Brain Life, LLC v. Elekta Inc., 746 F.3d 1045 (Fed. Cir. 2014).....	15, 16
9	Cross Med. Prods. v. Medtronic Sofamor Danek, Inc., 424 F.3d 1293, 1310 (Fed.	
10	Cir. 2005).....	9
11	Crowell v. Baker Oil Tools, Inc., 165 F.2d 214 (9th Cir. 1948).....	15
12	Dawn Equip. Co. v. Ky. Farms, Inc., 140 F.3d 1009, 1014 (Fed. Cir. 1998).....	9
13	Duncan Parking Techs., Inc. v. IPS Grp., Inc., 914 F.3d 1347, 1362 (Fed. Cir.	
14	2019).....	9
15	Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473, 1479 (Fed. Cir. 1998).....	18
16	Horton v. Horton, 18 Cal. 2d 579, 116 P.2d 605, 608 (Cal. 1941).....	14
17	In re PersonalWeb Techs., LLC, 2019 U.S. Dist. Lexis 56804 (ND Cal. 2019).....	15
18	Kessler v. Eldred, 206 U.S. 285, 285 (1907).....	14
19	Speedtrack, Inc. v. Office Depot, Inc., 791 F.3d 1317, 1325 (Fed. Cir. 2015).....	15
20	Lockwood v. Am. Airll , Inc., 107 F.3d 1565, 1572, 41 USPQ2d 1961, 1966 (Fed.	
21	Cir. 1997).....	22
22	London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991).....	9
23	Martin v. General Finance Co., 239 Cal.App.2d 438, 443, 48 Cal. Rptr. 773 (1966).	
24	13
25	MGA, Inc. v. General Motors Corp., 827 F.2d 729, 731 (Fed. Cir. 1987).....	16
26	Mid-Century Ins. Co. v. Gardner, 9 Cal. App. 4th 1205, 1213, 11 Cal. Rptr. 2d 918	
27	(1992).....	26
28	Molinaro v. Am. Tel & Tel. Co., 460 F. Supp. 673, 675 (E.D. Penn. 1978).....	16

1	New Railhead Mfg., L.L.C. v. Vermeer Mfg. Co., 298 F.3d 1290, 1294, 63	
2	USPQ2d 1843, 1846 (Fed. Cir. 2002).....	22
3	Personalized Media Communications, LLC v. International Trade Commission,	
4	161 F. 3d 696, 704 (Fed. Cir. 1998).....	20
5	Primos, Inc. v. Hunter's Specialties, Inc., 451 F.3d 841, 850 (Fed. Cir. 2006) 10	
6	Purdue Pharma L.P. v. Faulding Inc., 230 F.3d 1320, 1323 (Fed. Cir. 2000).....	18
7	Regents of the Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1566 (Fed. Cir.	
8	1997).....	18
9	Rubber Tire Wheel Co. v. Goodyear Tire and Rubber Co., 232 U.S. 413, 418-19	
10	(1914).....	15
11	Rubber Tire Wheel Co. v. Goodyear Tire and Rubber Co., 232 U.S. 413, 418-19	
12	(1914).....	
13	15
14	Shoom, Inc. v. Elec. Imaging Sys. of Am., 2011 U.S. Dist. Lexis 114354 (ND Cal.	
15	2011).....	15
16	Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 539, 99 Cal. Rptr.	
17	2d 824 (2000).....	26
18	SpeedTrack, Inc. v. Office Depot, Inc., 2014 U.S. Dist. Lexis 62674 (ND Cal.	
19	2014).....	15
20	Tech. Props. Ltd. LLC v. Barnes & Noble, Inc., 2015 U.S. Dist. Lexis 192876 (ND	
21	Cal. 2015).....	15
22	Transco Prods., Inc. v. Performance Contracting, Inc., 38 F.3d 551, 32 USPQ2d	
23	1077 (Fed. Cir. 1994).....	22
24	Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1117	
25	(Fed. Cir. 1991).....	22
26	Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc., 99 Cal. App. 4th 228, 245, 121 Cal.	
27	Rptr. 2d 1 (2002).....	26
28	Warner-Jenkinson Company, Inc. v. Hilton Davis Chemical Co., 520 U.S. 17	
	(1997).....	9

1	Watts v. XL Systems, Inc., 232 F.3d 877, 880 (Fed. Cir. 2000).....	19
2	Williams v. Williams (In re Williams' Estate), 36 Cal. 2d 289, 223 P.2d 248 (Cal.	
3	1950).....	14
4	Williamson v. Citrix Online, LLC, 792 F.3d 1339, 1348 (Fed. Cir. 2015).....	1

PRIOR ART (NOT PREVIOUSLY CONSIDERED)

NASA publication N9219920, entitled “Real-Time Recursive Filter for the Attitude Determination of the Spacelab Instrument Pointing Subsystem” by West, M.E., published 1992, NTIS issue number 199213 (“West”).....25

NASA publication N9618524, entitled “ASTRO-2 Spacelab Instrument Pointing System Mission Performance” by Wessling, F. C.; Singh, S. P., published 1995, NTIS issue number 199612, and presented at the AIAA 1995 Space Programs and Technologies Conference, Huntsville, AL, United States, 26-28 Sep. 1995 (“Wessling”).....25

“The Instrument Pointing System: Precision Attitude Control in Space” by Ralf Hartmann, et al., presented at the North Atlantic Treaty Organization, Advisory Group for Aerospace Research and Development (AGARD), Flight Mechanics Panel Symposium held in Luxembourg, November 13-16, 1989, and published June 1990 in AGARD Conference Proceedings No.489, Space Vehicle Flight Mechanics, ISBN 92-835-0567-0, at pages 17-1 to 17-11 (“Hartmann”).....25

US Patent 3,986,092 to Tijsma et al. (“Tijsma”), entitled *Stabilization System for a Platform Suspended in a Gimbal Frame*, which was filed on March 9, 1973 and issued on October 12, 1976.....26

US Patent 3,936,716 to Bos (“Bos”), entitled *Stabilisation System*, which was filed on November 28, 1973 and issued on February 3, 1976.....26

PCT Application Publication No. WO99/04224A1 by Applicant Hollandse Signaalapparaten B.V. (“Hollandse”), entitled *System for the Stabilization of an Object Mounted on a Moving Platform*, which was filed on 07/08/1998, with a priority date of 07/16/1997 and a publication date of 01/28/1999.....26

I. NONINFRINGEMENT

A. Contentions of Fact

Defendants contend that the accused MakoHead stabilizer (the “MakoHead”) does not infringe any asserted claim (i.e., claims 1, 3, 4, 14, 32, 35 and 38) of US Patent No. 6,611,662 (the ‘662 patent) because the MakoHead omits elements (i.e., limitations) recited in the asserted claims.

The outer axis angular rate sensor 210o and the inner axis angular rate sensor 210i of the MakoHead do not constitute a “first sensor package” as required by every claim of the ‘662 Patent. The outer axis angular rate sensor 210o and the inner axis angular rate sensor 210i are separate sensors, located apart from each other, are not connected and operate independently.

If the outer axis angular rate sensor 210o of the MakoHead is deemed to be a “first sensor package,” Plaintiffs’ infringement claims fail. The outer axis angular rate sensor 210o is a single axis sensor that determines motion in only one dimension. It is incapable of sensing motion in two transverse directions, as required by all asserted claims of the ‘662 Patent.

If the outer axis angular rate sensor 210o and inner axis angular rate sensor 210i are deemed to constitute a “sensor package,” they still do not determine, in two transverse directions, motion of a vehicle/object on which the stabilized platform is mounted, as required by every asserted claim. During use, the inner axis angular rate sensor 210i moves constantly, with the outer gimbal 135, in a manner that differs from motion of the base 105 and, therefore, cannot sense motion of the base 105 or of a vehicle/object to which the base 105 is attached. It is not enough for the MakoHead sensors to determine motion in two transverse directions. To meet the claim limitation, the motion that is determined in two transverse directions must be the motion of the vehicle/object on which the MakoHead is mounted, and not the motion of something other than the

1 vehicle/object.. Because the inner axis angular rate sensor 210i cannot sense
2 motion of the base 105 or of a vehicle/object to which the base 105 is attached, the
3 MakoHead does not and cannot sense, in two transverse directions, motion of a
4 vehicle/object on which the stabilized platform is mounted.

5 All asserted claims of the '662 patent recite a second sensor package that is
6 "fixed to the payload platform." As the MakoHead does not have a second sensor
7 package fixed (or mounted) to the payload platform, infringement of all asserted
8 claims of the '662 patent is precluded. An upper sensor enclosure 150 is attached
9 to the top of the MakoHead inner gimbal assembly 140. The upper enclosure 150 is
10 not the payload platform 155 of the MakoHead. The upper enclosure 150 is a
11 separate structure from the payload platform 155. The payload platform 155 is
12 removable, while the upper sensor enclosure 150 is not. Sensors within the upper
13 enclosure 150 are not attached, much less wholly attached, or mounted to the
14 payload platform 155, a separate removable structure.

15 Independent Claim 1 recites "the first sensor package is fixed with respect to
16 the base." The Court's claim construction order construes "fixed with respect to"
17 as "in a continuous, unchanging relationship with." During use, the inner axis
18 angular rate sensor 210i moves constantly, with the outer gimbal 135, in a manner
19 that differs from motion of the base 105. The position and motion of the inner
20 axis angular rate sensor 210i differs constantly from the position and motion of the
21 base. Thus, the inner axis angular rate sensor 210i is not fixed with respect to the
22 base.

23 Each method claim recites "information collected by a first sensor package"
24 thereby requiring a first sensor package that collects information. Assuming,
25 *arguendo*, that the MakoHead outer axis angular rate sensor 210o and the inner
26 axis angular rate sensor 210i somehow constitute a "first sensor package" as
27 alleged by Plaintiffs, they do not collect information. The outer axis angular rate
28

1 sensor 210o and the inner axis angular rate sensor 210i each generate analog output
 2 in response to sensed rotations about their input axis. The output is not collected by
 3 either the outer axis angular rate sensor 210o or the inner axis angular rate sensor
 4 210i. Thus, the components that Plaintiffs erroneously contend constitute a “first
 5 sensor package” are not information collectors. They do not perform the
 6 “collection” of information that is plainly required by every method claim of the
 7 ‘662 Patent.

8 **B. Contentions of Law**

9 “To infringe a claim, each claim limitation must be present in the accused
 10 product.” *Dawn Equip. Co. v. Ky. Farms, Inc.*, 140 F.3d 1009, 1014 (Fed. Cir.
 11 1998). The patentee must establish infringement by a preponderance of the
 12 evidence. *Cross Med. Prods. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293,
 13 1310 (Fed. Cir. 2005). “A patentee claiming infringement must present proof that
 14 the alleged infringing device meets each and every claim limitation.” *Forest*
 15 *Labs., Inc. v. Abbott Labs.*, 239 F.3d 1305, 1310 (Fed. Cir. 2001) (citations
 16 omitted); See *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1535 (Fed. Cir.
 17 1991) (the absence of one claim element establishes non-infringement).

18 The doctrine of equivalents is limited. The test for equivalents be applied on
 19 an element-by-element basis. *Warner-Jenkinson Company, Inc. v. Hilton Davis*
 20 *Chemical Co.*, 520 U.S. 17 (1997). Additionally, the test cannot be applied to read
 21 out a claim limitation. “It is the role of the court ... to ensure that the doctrine of
 22 equivalents is not permitted to overtake the statutory function of the claims in
 23 defining the scope of the patentee’s exclusive rights...” *Id.* The doctrine of
 24 equivalents is not “simply the second prong of every infringement charge,
 25 regularly available to extend protection beyond the scope of the claims.” *London*
 26 *v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991); *see also*
 27 *Duncan Parking Techs., Inc. v. IPS Grp., Inc.*, 914 F.3d 1347, 1362 (Fed. Cir.
 28

2019) (“[T]he doctrine of equivalents cannot be used to effectively read out a claim limitation . . . because the public has a right to rely on the language of patent claims.” (citing *Primos, Inc. v. Hunter’s Specialties, Inc.*, 451 F.3d 841, 850 (Fed. Cir. 2006))).

A more detailed description of the accused MakoHead, contentions of fact and contentions of law pertaining to non-infringement are set forth in Exhibit A.

II. RES JUDICATA

A. Contentions of Fact

Mako Products, Inc., formerly a Florida corporation, was owned by Jordan Klein, Sr. and Jordan Klein, Jr. The corporation liquidated and dissolved pursuant to and in accordance with a voluntary bankruptcy, under Chapter 7 of the Bankruptcy Code, Case # 3:12-bk-06572-JAF (M.D. FL). [Dkt. 303-1]. In the bankruptcy case, Plaintiffs David Grober and Voice International, Inc. filed claims [Dkts. 303-2, 303-3] for infringement of the ‘662 patent. The trustee objected to each claim on May 1, 2013 [Dkt. 27, 28 of the Bankruptcy Case]. Plaintiffs had 30 days to respond to the objection. Plaintiffs did not respond. On June 4, 2013, the Bankruptcy Court entered orders disallowing the claims in their entirety [Dkts. 303-4, 303-5]. Plaintiffs had 14 days to appeal the order, but did not appeal. The Bankruptcy Court approved the sale of all assets on May 15, 2013 [Dkt. 35 of Bankruptcy Case-- Bankruptcy Case Docket Attached as Dkt. 303-1] over the strenuous objection of Plaintiffs, after briefing and a hearing. The appeal time for that order was also 14 days. Plaintiffs did not appeal. The trustee filed a final account on September 5, 2014 [Dkt. 59 of the Bankruptcy Case]. Plaintiffs had 30 days to object the final account. Plaintiffs did not object. The Bankruptcy Court issued a final order [Dkt. 60 of Bankruptcy Case] and closed the case on October 7, 2014. Plaintiffs had 14 days to appeal the order, but did not appeal. The Bankruptcy Case is closed and well beyond any time for appeal.

1 As mentioned above, assets including equipment and accounts of Mako
2 Products were sold in the bankruptcy, over the strenuous objection of Plaintiffs,
3 after briefing and a hearing. On March 25, 2013, the Trustee filed the Sale Notice
4 under which a sale of the Assets for \$15,000 to Jordan Klein, Sr., Jordan Klein, Jr.,
5 John Dann, and their assigns (collectively, the "Purchaser") was noticed to parties in
6 interest in the Bankruptcy Case. [Order Approving Sale – p. 2, para. 1] The Sale
7 Notice outlined the procedure for submission of bids in excess of the \$15, 000
8 offered by the Purchaser. [Order Approving Sale, p. 2, para. 2]. On April 10,
9 2013, Grober submitted a \$16,000 bid offer to the Trustee for the Assets under the
10 Sale Notice. [Order Approving Sale, p. 2, para. 3]. On April 15, 2013, Grober
11 filed a Motion to Prevent the Sale. [Order Approving Sale, p. 3, para. 4]. On April
12 19, 2013, the Trustee filed a Response to Motion to Prevent the Sale. [Order
13 Approving Sale, p. 3, para. 5]. On April 19, 2013, the Trustee filed a Motion to
14 Set Auction. [Order Approving Sale, p. 3, para. 6]. On April 30, 2013, Grober
15 filed a Motion to Continue. [Order Approving Sale, p. 3, para. 7]. On May 1,
16 2013, the Trustee filed a Response in Opposition to Grober's Motion to Continue.
17 [Order Approving Sale, p. 3, para. 8]. After hearing argument at a Hearing on May
18 8, 2013, the Court conducted an auction of the Assets in open Court, as specifically
19 contemplated in the Sale Notice. [Order Approving Sale, p. 3, para. 10]. Grober
20 and Voice International were given advanced notice by the Trustee that the Trustee
21 would seek to have the Court conduct an auction at the Hearing. [Id.] The
22 Purchaser (OPEL), under the terms of the Sale Notice, increased its bid to \$20,000
23 (the "Purchase Price") in open court for the purchase of the Assets. [Order
24 Approving Sale, p. 3, para. 12]. Neither Grober nor Voice International submitted
25 bids in the Court-conducted auction during the Hearing. [Order Approving Sale, p.
26 4, para. 13]. The \$20,000 Purchase Price to be paid by the Purchaser was the
27 highest and best offer for the purchase of the Assets. [Order Approving Sale, p. 4,
28

para. 14]. A copy of The Trustee's Bill of Sale, dated June 3, 2013, identifies Oceanic Production Equipment Ltd. (OPEL) as the Buyer.

B. Contentions of Law

1. Collateral Estoppel

Collateral estoppel applies because (1) the issue necessarily decided at the bankruptcy is identical to the one which is sought to be re-litigated; (2) the bankruptcy ended with a final judgment on the merits; and (3) the Plaintiffs, against whom collateral estoppel is asserted, were the creditors who asserted the infringement claim in the bankruptcy.

Here, the third element warrants little discussion, as there is no dispute that Plaintiffs David Grober and Voice International, Inc. are the parties against whom collateral estoppel is asserted, and are also the parties who asserted the infringement claim in the bankruptcy.

Additionally, the first element is satisfied because the issue necessarily decided at the bankruptcy is identical to the one which is sought to be re-litigated. That issue is whether use of a MakoHead infringes US Patent No. 6,611,662 (the '662 patent). As in the current action, Plaintiffs alleged in their bankruptcy claims that use of the MakoHead infringes the '662 patent. For obvious reasons, Plaintiffs' motion [Dkt. 323] misrepresents Plaintiffs claims filed in the Mako Products Bankruptcy as a claim for "owed money." [Dkt. 323, p. 4, para. 1]. The claims were not for money owed. Rather, Plaintiffs' Claims [Dkts. 303-2, 303-3] filed in the Mako Products Bankruptcy expressly assert patent infringement as the basis for Plaintiffs' claims. Plaintiffs set forth patent infringement in Box 2 ("Basis for Claim") of each Proof of Claim Form [Dkts. 303-2, 303-3]. Additionally, in the first page of Plaintiffs' statement accompanying each Proof of Claim Form, Plaintiffs assert patent infringement.

1 The Bankruptcy claims involve the same '662 patent. The statement filed on
 2 behalf of Plaintiff Grober states "Mr. Grober has a claim for the infringement
 3 and/or use of his patent; 6,611,662" [Dkt. 303-2, page 2, para. 2]. Plaintiff Voice
 4 International made a similar assertion in its claim. [Dkt. 303-3, page 2, para. 2].

5 The Bankruptcy claims involve the same accused products. The first page of
 6 Plaintiffs' statement accompanying each Proof of Claim Form specifically
 7 mentions "MakoHeads" and the prior lawsuit, Case 2:04-cv-08604, in which
 8 Plaintiffs alleged that the MakoHeads infringed the '662 patent. The MakoHeads
 9 accused in this lawsuit are the same MakoHeads that existed during the prior
 10 lawsuit, and the same MakoHeads that existed at the time of the Bankruptcy
 11 claims.

12 The second element is satisfied because, the bankruptcy court's
 13 disallowance of Plaintiffs' claims "in their entirety" is a final judgment on the
 14 merits. Collateral estoppel applies when judgment has been procured by default as
 15 long as (1) defendant had actual knowledge of the proceedings and a "full and fair
 16 opportunity to litigate," *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119,
 17 1124 (9th Cir. 2003), and (2) the prior proceeding's record either demonstrates an
 18 express finding upon the allegation for which preclusion is sought or the court in
 19 the prior proceeding necessarily decided the issue, in that the issue was actually
 20 litigated. *Id.* A default judgment represents a judgment "on the merits" and
 21 defendant may not relitigate liability on the same claims in later litigation. *Martin*
 22 *v. General Finance Co.*, 239 Cal.App.2d 438, 443, 48 Cal. Rptr. 773 (1966).

23 The Bankruptcy Court's disallowances of Plaintiffs claims "in their
 24 entirety," constitute express findings upon the allegation for which preclusion is
 25 sought and necessarily decide the issue of patent infringement asserted in Plaintiffs
 26 claims. As mentioned above, Plaintiffs' bankruptcy claims [Dkts. 303-2, 303-3]
 27 asserted patent infringement as a basis. The claims identified the '662 patent and
 28

1 the accused MakoHeads. The Bankruptcy Court denied Plaintiffs' patent
2 infringement claims, expressly, "in their entirety." [Dkts. 303-4, 303-5].

3 The Bankruptcy Court's disallowances of Plaintiffs' claims of patent
4 infringement constitute decisions on the merits for purposes of res judicata and
5 collateral estoppel. As recounted above, Plaintiffs substantially participated in the
6 bankruptcy action, filed the claims for patent infringement in the bankruptcy
7 action, and had a full and fair opportunity to assert the claims on the merits.
8 However, after filing the claims, Plaintiffs failed to assert the claims. Plaintiffs
9 failed to respond to objections, amend the claims or appeal. Plaintiffs essentially
10 defaulted on claims that Plaintiffs filed. In *Williams v. Williams (In re Williams'*
11 *Estate)*, 36 Cal. 2d 289, 223 P.2d 248 (Cal. 1950), the California Supreme Court
12 held that "the fact that [a] judgment was secured by default does not warrant the
13 application of a special rule. 'A default judgment is an estoppel as to all issues
14 necessarily litigated therein and determined thereby exactly like any other
15 judgment. '" 223 P.2d at 252 (quoting *Horton v. Horton*, 18 Cal. 2d 579, 116 P.2d
16 605, 608 (Cal. 1941)). Issues determined by the Bankruptcy Court's denial of
17 Plaintiffs' patent infringement claims, expressly, "in their entirety." [Dkts. 303-4,
18 303-5], include the issue of infringement of the '662 patent by use of the
19 MakoHeads. Thus, collateral estoppel bars this patent infringement action.

20 **2. Kessler Doctrine**

21 Plaintiffs's suit is also barred by the Kessler Doctrine, a specific application
22 of res judicata in patent infringement cases. The Kessler Doctrine, first set out by
23 the Supreme Court in 1907 in *Kessler v. Eldred*, 206 U.S. 285, 285 (1907),
24 prohibits subsequent suits for patent infringement against a previous defendant or
25 that defendant's customers based upon principles of res judicata. The Supreme
26 Court subsequently interpreted Kessler as granting a limited trade right, i.e. "the
27 right to have that which it lawfully produces freely bought and sold without
28

1 restraint or interference. It is a right which attaches to its product—to a particular
 2 thing—as an article of lawful commerce..." *Rubber Tire Wheel Co. v. Goodyear*
 3 *Tire and Rubber Co.*, 232 U.S. 413, 418-19 (1914). *Kessler* applies to claims for
 4 infringement of a patent found to be not infringed in a previous case, and it bars a
 5 subsequent suit against a party when the devices are the same or "essentially the
 6 same." *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045 (Fed. Cir. 2014). Here the
 7 accused product, i.e., the MakoHead is exactly same, not merely similar, but it is
 8 exactly the same product accused of infringement in the bankruptcy.

9 The *Kessler* doctrine is no old and antiquated rule. The Federal Circuit
 10 follows it, noting that it "bars a patent infringement action against a customer of a
 11 seller who has previously prevailed against the patentee because of ...
 12 noninfringement of the patent; otherwise, the effect of the prior judgment would be
 13 virtually destroyed." *Id.* at 734. Indeed, the doctrine has been applied and followed
 14 by the Ninth Circuit Court of Appeals prior to establishment of the Federal Circuit
 15 and its predecessor, the Court of Customs and Patent Appeals, *Crowell v. Baker Oil*
 16 *Tools, Inc.*, 165 F.2d 214 (9th Cir. 1948), and repeatedly by California district
 17 courts. *In re PersonalWeb Techs., LLC*, 2019 U.S. Dist. Lexis 56804 (ND Cal.
 18 2019); *Adaptix, Inc. v. Amazon.com, Inc.*, 2016 U.S. Dist. Lexis 33521 (ND Cal.
 19 2016); *Adaptix, Inc. v. Amazon.com, Inc.*, 2015 U.S. Dist. Lexis 111933 (ND Cal.
 20 2015); *Tech. Props. Ltd. LLC v. Barnes & Noble, Inc.*, 2015 U.S. Dist. Lexis
 21 192876 (ND Cal. 2015); *SpeedTrack, Inc. v. Office Depot, Inc.*, 2014 U.S. Dist.
 22 Lexis 62674 (ND Cal. 2014); *Shoom, Inc. v. Elec. Imaging Sys. of Am.*, 2011 U.S.
 23 Dist. Lexis 114354 (ND Cal. 2011). Binding precedent of the Federal Circuit also
 24 repeatedly follows *Kessler*. *Speedtrack, Inc. v. Office Depot, Inc.*, 791 F.3d 1317,
 25 1325 (Fed. Cir. 2015) ("We conclude that the rationale underlying the *Kessler*
 26 doctrine supports permitting customers to assert it as a defense to infringement
 27 claims. Although the Supreme Court in *Kessler* focused exclusively on the
 28

1 manufacturer's rights, and expressed no opinion on whether a customer could
2 assert the defense, it recognized the fact that the manufacturer and customer's
3 interests are intertwined, remarking that "[n]o one wishes to buy anything if with it
4 he must buy a lawsuit." See *Id.* Allowing customers to assert a Kessler defense is
5 consistent with the Court's goal of protecting the manufacturer's right to sell an
6 exonerated product free from interference or restraint. A manufacturer cannot sell
7 freely if it has no customers who can buy freely."); *Brain Life, LLC v. Elekta Inc.*,
8 746 F.3d 1045, 1048 (Fed. Cir. 2014); *MGA, Inc. v. General Motors Corp.*, 827
9 F.2d 729, 731 (Fed. Cir. 1987).

10 Kessler applies to claims that were brought, as well as to claims that could
11 have been brought in the prior action. In *Molinaro v. Am. Tel & Tel. Co.*, 460 F.
12 Supp. 673, 675 (E.D. Penn. 1978), the previous suit was dismissed with prejudice
13 as a sanction for failure to comply with discovery orders. The Molinaro court
14 explained that the "analysis of the applicability of the Kessler doctrine is not
15 altered by the fact that the infringement question in the instant case was not
16 actually litigated in the [prior] suit." *Id.* at 676. Molinaro is consistent with Federal
17 Circuit precedent, which explains that the Kessler doctrine applies to claims that
18 "could have been brought" in the prior action. See *Brain Life*, 746 F.3d at 1059
19 (method claims were not actually litigated in the prior action but were barred by
20 *Kessler*).

21 In brief, the '662 patent asserted in this action is the same '662 patent
22 asserted in the bankruptcy case. The MakoHeads accused in this action are the
23 same as the MakoHeads accused in the bankruptcy case. Defendant Oceanic
24 Production Equipment, Ltd., purchased the MakoHeads from Mako Products, Inc.
25 in the bankruptcy, and therefore is a customer. The Oppenheimer Defendants are
26 accused of renting one or more of the MakoHeads, making the Oppenheimer
27 Defendants a customer. As a consequence of Plaintiffs' failed patent infringement
28

claim alleging infringement by Mako Products, Inc., by use of the MakoHead, the MakoHead is an “exonerated product” under the Kessler doctrine. The Kessler doctrine bars this patent infringement action. Otherwise, the effect of the prior ruling by the Federal District Court in the Bankruptcy would be virtually destroyed. *MGA, Inc.*, 827 F.2d at 734.

III. INVALIDITY FOR LACK OF WRITTEN DESCRIPTION AND LACK OF ENABLEMENT OF THE CONTROL SYSTEM

A. Contentions of Fact

Every product claim of the ‘662 Patent recites a “control system for...” Independent product Claims 1, 29, 32-35, and 38 recite “a control system ... for stabilizing the platform in response to information provided by the first sensor package and the second sensor package.” Independent Claim 30 recites “a control system for continuously stabilizing the platform based on information provided by the first sensor package and correcting for first sensor package anomalies based on information provided periodically by the second sensor package.” Several of the independent product claims recite additional limitations to the control system. Claim 29 recites “wherein the control system responds to information provided by the second sensor package to correct for the drift from the predetermined position.” Claim 32 recites “wherein the control system allows a user to set an initial payload platform position and provides self correction of the platform to the initial position.” Claim 33 recites “wherein the control system responds to information from the first sensor package at a rate of at least as fast as about one hundred times per second and the control system responds to information from the second sensor package at a rate of about once per second to about once per minute.” Claim 38 recites “wherein the control system responds to information from the first sensor package more often than the control system responds to information from the second sensor package.”

1 The ‘662 Patent treats the control system as a proverbial “black box.” An
 2 example of a suitable control system is not provided. Conspicuously absent from
 3 the ‘662 Patent is any description of any component or combination of components
 4 that make up the control system. Also absent from the ‘662 Patent is any
 5 description of how the control system performs its functions. Digital processing
 6 components and steps are not described. An algorithm, pseudocode or flow chart
 7 showing processing steps are not provided for a digital implementation. The
 8 discrete elements of an analog implementation, a schematic or a high level block
 9 diagram of such an implementation, are all missing from the ‘662 Patent. The
 10 steps of methods by which the control system performs the various recited
 11 functions are not described. In sum, the ‘662 does not provide any meaningful
 12 description of the control system.

13 **B. Contentions of Law**

14 To satisfy the written description requirement, “the patent specification must
 15 clearly allow persons of ordinary skill in the art to recognize that [the inventor]
 16 invented what is claimed.” *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473,
 17 1479 (Fed. Cir. 1998) (internal quotations and citation omitted); accord *Regents of*
 18 *the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1566 (Fed. Cir. 1997). This
 19 means that a patent applicant must convey with reasonable clarity to those of skill
 20 in the art that, as of the patent application filing date, the applicant was “in
 21 possession” of the invention. *Purdue Pharma L.P. v. Faulding Inc.*, 230 F.3d 1320,
 22 1323 (Fed. Cir. 2000).

23 The text and drawings of the ‘662 specification do not describe components
 24 or a method of operation of the control system. Under these circumstances, the
 25 ‘662 Patent cannot possibly be deemed to provide an adequate written description
 26 for any of the product claims, each of which recites a control system. From the
 27
 28

specification, no one can discern if Grober possessed the invention, which includes the recited control system, at the time of the application.

IV. INVALIDITY OF EVERY PRODUCT CLAIM FOR INDEFINITENESS

A. Contentions of Fact

Every product claim of the ‘662 Patent recites a “control system” for performing a function. Independent product Claims 1, 29, 32-35, and 38 recite “a control system ... for stabilizing the platform in response to information provided by the first sensor package and the second sensor package.” Independent Claim 30 recites “a control system for continuously stabilizing the platform based on information provided by the first sensor package and correcting for first sensor package anomalies based on information provided periodically by the second sensor package.”

B. Contentions of Law

Paragraph 6 of pre-AIA 35 USC §112 (¶ (f) of AIA 35 USC §112) allows functional claiming, but only if the specification describes corresponding structure.

Where, as here, a claim limitation that does not use the term “means” fails to “‘recite sufficiently definite structure’ or else recites ‘function without reciting sufficient structure for performing that function,’” 35 U.S.C. 112(f) or pre-AIA 35 U.S.C. 112, sixth paragraph, applies. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1348 (Fed. Cir. 2015) (*en banc*) (quoting *Watts v. XL Systems, Inc.*, 232 F.3d 877, 880 (Fed. Cir. 2000)); see also *Personalized Media Communications, LLC v. International Trade Commission*, 161 F. 3d 696, 704 (Fed. Cir. 1998). Instead of using “means”, the term control system acts as a generic placeholder for the term “means” and would not be recognized by one of ordinary skill in the art as being sufficiently definite structure for performing the claimed function.

As every product claim recites means-plus-function elements without disclosing corresponding structure in the specification, the claims are invalid. *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946, 950 (Fed. Cir. 2007).

V. INVALIDITY OF EVERY METHOD CLAIM FOR LACK OF WRITTEN DESCRIPTION OF INFORMATION COLLECTION

A. Contentions of Fact

Each method claim expressly requires, *inter alia*, first and second sensor packages that collect information by reciting, “information collected by a first [or the second] sensor package.” Thus, both recited sensor packages must be capable of collecting information. However, the specification of the ‘662 Patent does not describe any sensor, much less a first sensor package and a second sensor package, that is capable of collecting information.

B. Contentions of Law

The law applicable to the written description requirement is the same as set forth above. As the ‘662 Patent specification is devoid of any description of information collection components and methodologies for each sensor package, the written description requirement is not satisfied and all method claims are invalid.

VI. INVALIDITY OF EVERY METHOD CLAIM FOR LACK OF WRITTEN DESCRIPTION OF SELF CORRECTING

A. Contentions of Fact

The method claims recite “A method of ... self correcting ... comprising self correcting ...” Yet, the specification is wholly devoid of any description of how the self correcting is accomplished and what components are used to perform the self correcting.

B. Contentions of Law

The law applicable to the written description requirement is the same as set forth above. As the ‘662 Patent specification is devoid of any

description of self correcting, all method claims, i.e., Claims 14-28, 31, and 46-60, of the '662 Patent are invalid.

VII. INVALIDITY OF EVERY ASSERTED CLAIM UNDER 35 USC 102, 103

A. The '662 Patent is Not Entitled to Priority of the Provisional Application

1. Contentions of Fact

a. Control System

Every product claim of the '662 Patent recites a control system for performing particular functions and having particular connections with other components. However, the provisional application does not describe the recited control system, functions or connections. Instead, in the first full paragraph of page 8 of the provisional application, Plaintiffs admit that the structure and methodology that enable the "servo control system" to function are beyond the scope of the provisional application. The provisional application does not describe the types or number of specific components of a control system, or how they are connected and configured, or their functions or their methods of operation. The provisional application does not illustrate any such components or connections. The servo control system and electronic control box 20 briefly mentioned in the provisional application is a proverbial "black box," the structure, connections and method of operation of which are not described anywhere in the provisional application.

b. Methods

The provisional application does not describe or illustrate any steps of the method claims of the '662 patent, or how self correcting is accomplished, or how a sensor collects information.

2. Contentions of Law

App. No. 09/579,723, from which the '662 Patent issued, is not entitled to the benefit of priority of Provisional Application Serial No. 60/136,756 filed May 28, 1999, because the Provisional Application does not comply with the written description and enablement requirements of 35 U.S.C. 112(a). Under 35 U.S.C. 119(e) and MPEP 211.05, to be entitled to the benefit of the filing date of the earlier-filed provisional application, the disclosure of the invention in the provisional application must be sufficient to comply with the requirements of 35 U.S.C. 112(a), except for the best mode requirement. See *Transco Prods., Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 32 USPQ2d 1077 (Fed. Cir. 1994). To comply with the written description requirement, the provisional application must convey with reasonable clarity to those skilled in the art that, as of the filing date sought, applicant was in possession of the invention as now claimed. See, e.g., MPEP 1263.02, *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1117 (Fed. Cir. 1991). An applicant shows possession of the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention. *Lockwood v. Am. Airll, Inc.*, 107 F.3d 1565, 1572, 41 USPQ2d 1961, 1966 (Fed. Cir. 1997). Concomitantly, to comply with the enablement requirement of 35 U.S.C. 112(a), "the specification of the provisional must contain a written description of the invention and the manner and process of making and using it, in such full, clear, concise, and exact terms, 35 U.S.C. 112¶1, to enable an ordinarily skilled artisan to practice the invention claimed in the nonprovisional application." *New Railhead Mfg., L.L.C. v. Vermeer Mfg. Co.*, 298 F.3d 1290, 1294, 63 USPQ2d 1843, 1846 (Fed. Cir. 2002). The provisional application does not even come close to satisfying these requirements.

B. Invalidity for Anticipation and/or Obviousness

1. Contentions of Fact and Law

1 Claims 1, 3, 4, 14, 31, 32, 35 and 38 are anticipated by and obvious in view
2 of NASA publication N9219920, entitled "Real-Time Recursive Filter for the
3 Attitude Determination of the Spacelab Instrument Pointing Subsystem" by West,
4 M.E., published 1992, NTIS issue number 199213 ("West"); and by West in view
5 of NASA publication N9618524, entitled "ASTRO-2 Spacelab Instrument Pointing
6 System Mission Performance" by Wessling, F. C.; Singh, S. P., published 1995,
7 NTIS issue number 199612, and presented at the AIAA 1995 Space Programs and
8 Technologies Conference, Huntsville, AL, United States, 26-28 Sep. 1995
9 ("Wessling"); and by West in view of Wessling and "The Instrument Pointing
10 System: Precision Attitude Control in Space" by Ralf Hartmann, et al., presented at
11 the North Atlantic Treaty Organization, Advisory Group for Aerospace Research
12 and Development (AGARD), Flight Mechanics Panel Symposium held in
13 Luxembourg, November 13-16, 1989, and published June 1990 in AGARD
14 Conference Proceedings No.489, Space Vehicle Flight Mechanics, ISBN 92-835-
15 0567-0, at pages 17-1 to 17-11 (hereinafter "Hartmann"). West, Wessling and
16 Hartmann were not cited during the original examination or previous
17 reexamination, and are prior art under 35 U.S.C. 102(a), (b), (g) (Pre-AIA) and
18 103(a) (Pre-AIA). West, Wessling and Hartmann describe NASA's instrument
19 pointing system used on shuttle missions. West discloses all elements of the
20 identified claims. Wessling and Hartmann elaborate on descriptions of the
21 elements.

22 West and Wessling are publications available from the National Technical
23 Information Service (NTIS) of the US Department of Commerce, and from the
24 National Aeronautics and Space Administration (NASA), and from NASA
25 depository libraries throughout the US, which include the University of Florida.
26 Wessling is also available from the American Institute of Aeronautics and
27
28

1 Astronautics (AIAA) [www.aiaa.org], which hosted the 1995 Space Programs and
2 Technologies Conference, Huntsville, AL at which Wessling was presented.

3 Hartmann is available from NTIS, the Defense Technical Information Center
4 (DTIC) and libraries throughout the United States, including the Hunt Library at
5 Embry-Riddle Aeronautical University. DTIC, a Department of Defense (DoD)
6 Field Activity established in 1945, operates under the leadership of the Secretary of
7 Defense and reports to the Under Secretary of Defense for Research and
8 Engineering USD(R&E).

9 Claims 1, 3, 4, 14, 31, 32, 35 and 38 are anticipated by US Patent 3,986,092
10 to Tijsma et al. ("Tijsma"), entitled *Stabilization System for a Platform Suspended*
11 *in a Gimbal Frame*, which was filed on March 9, 1973 and issued on October 12,
12 1976. Tijsma was not cited during the original examination or previous
13 reexamination, and is prior art under 35 U.S.C. 102(a), (b) (Pre-AIA) and 103(a)
14 (Pre-AIA). Tijsma discloses all elements of the identified claims.

15 Claims 1, 3, 4, 14, 31, 32, 35 and 38 are anticipated by US Patent 3,936,716
16 to Bos ("Bos"), entitled *Stabilisation System*, which was filed on November 28,
17 1973 and issued on February 3, 1976. Bos was not cited during the original
18 examination or previous reexamination, and is prior art under 35 U.S.C. 102(a), (b)
19 (Pre-AIA) and 103(a) (Pre-AIA). Bos discloses all elements of the identified
20 claims.

21 Claims 1, 3, 4, 14, 31, 32, 35 and 38 are anticipated by PCT Application
22 Publication No. WO99/04224A1 by Applicant Hollandse Signaalapparaten B.V.
23 ("Hollandse"), entitled *System for the Stabilization of an Object Mounted on a*
24 *Moving Platform*, which was filed on 07/08/1998, with a priority date of
25 07/16/1997 and a publication date of 01/28/1999. As shown by the PCT
26 Bibliographic Data provided on the first page, Hollandse designated the US and
27 was published in English. Hollandse was not cited during the original examination
28

1 or previous reexamination, and is prior art under 35 U.S.C. 102(a), (b), (e) (Pre-
 2 AIA) and 103(a) (Pre-AIA). Hollandse discloses all elements of the identified
 3 claims.

4 A detailed analysis, including claim charts, is attached as Exhibit B. A copy
 5 of each prior art reference is provided in Exhibits C-H. Bibliographic data is
 6 included for each non-patent reference.

7 **VIII. ALTER EGO LIABILITY DOES NOT APPLY**

8 **A. Contentions of Fact**

9 Alter ego liability does not apply because Klein Sr. has no ownership
 10 interest in OPEL and lacks a unity of interest with OPEL. Klein Sr. and OPEL are
 11 separate and independent. Additionally, there would be no inequitable result if the
 12 accused acts of OPEL are treated as those of OPEL alone.

13 Klein Sr. has no control over the assets of OPEL and does not treat OPEL's
 14 assets as his own. Klein Sr. does not commingle funds with OPEL. Klein Sr. does
 15 not control finances of OPEL. Klein Sr. has not drained assets of OPEL. Any
 16 amounts paid to Klein Sr. by OPEL are amounts that Klein Sr. advanced on behalf
 17 of OPEL.

18 Klein Sr. has not engaged in any bad faith conduct in the formation and/or
 19 management of OPEL. Klein Sr. has never engaged in the management of OPEL.
 20 While some years ago Klein Sr. was named as an officer and director of OPEL, he
 21 never acted as an officer or director, and never requested or accepted appointment
 22 as an officer or director.

23 Klein Sr. is not and has never been an owner of OPEL. Klein Sr. owns no
 24 shares of OPEL. Klein Sr. does not own any warrants or options to purchase
 25 shares of OPEL. Klein Sr. has no ownership interest in OPEL.

26 This lawsuit has essentially put OPEL out of business. John Dann the sole
 27 owner, officer and director of OPEL decided to cease all rentals pending
 28

1 disposition of this lawsuit, to spare customers the horrors of being dragged into a
 2 patent infringement lawsuit. But for this lawsuit, John Dann would not have
 3 ceased rentals and OPEL would be profitable.

4 Plaintiffs have also failed to meet their burden of proof to establish alter ego
 5 liability as to Defendant Marty Oppenheimer. Plaintiffs cannot establish (and has
 6 not established) that any of the factors for proving alter ego liability has been met.
 7 Among other things, Plaintiffs have failed to show that Mr. Oppenheimer has a
 8 unity of interest with Defendants Oppenheimer Cine Rental, LLC and
 9 Oppenheimer Camera Products, Inc, or that it would be equitable to hold Mr.
 10 Oppenheimer individually liable. Mr. Oppenheimer also has no individual liability
 11 based on the corporate shield. In addition, neither Mr. Oppenheimer nor
 12 Oppenheimer Camera Products, Inc. is personally liable for any claims in this
 13 action since neither of them individually engaged in any alleged infringing acts.

14 **B. Contentions of Law**

15 California courts have rejected the view that the potential difficulty a
 16 plaintiff faces collecting a judgment is an inequitable result that warrants
 17 application of the alter ego doctrine. *Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc.*,
 18 99 Cal. App. 4th 228, 245, 121 Cal. Rptr. 2d 1 (2002) ("Alter ego will not be
 19 applied absent evidence that an injustice would result from the recognition of
 20 separate corporate identities, and 'difficulty in enforcing a judgment or collecting a
 21 debt does not satisfy this standard," quoting *Sonora Diamond Corp. v. Superior*
 22 *Court*, 83 Cal. App. 4th 523, 539, 99 Cal. Rptr. 2d 824 (2000)); *Mid-Century Ins.*
 23 *Co. v. Gardner*, 9 Cal. App. 4th 1205, 1213, 11 Cal. Rptr. 2d 918 (1992)
 24 ("Certainly, it is not sufficient to merely show that a creditor will remain
 25 unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy
 26 circumstance as proof of an 'inequitable result. In almost every instance where a
 27 plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor,'" quoting
 28

1 *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 842, 26 Cal.
 2 Rptr. 806 (1962)); *Mid-Century Ins. Co.*, supra, 9 Cal. App. 4th at 1213 ("The
 3 purpose of the doctrine is not to protect every unsatisfied creditor, but rather to
 4 afford him protection, where some conduct amounting to bad faith makes it
 5 inequitable, under the applicable rule above cited, for the equitable owner of a
 6 corporation to hide behind its corporate veil," quoting *Associated Vendors*, supra,
 7 210 Cal. App. 2d at 842). Such bad faith conduct is lacking here.

8 **IX. DAMAGES**

9 **A. Contentions of Fact**

10 Plaintiffs would not have sold or rented a stabilizer system to any person
 11 that rented a MakoHead from Defendants. Plaintiffs have not lost any profits as a
 12 result of any rentals by Defendants, and have not satisfied their burden of proof in
 13 proving *any* damages (lost profits or otherwise).

14 Plaintiffs did not obtain a preliminary injunction in any infringement action
 15 involving a MakoHead. Every summary judgment motion by Plaintiffs relating to
 16 infringement by a MakoHead has been denied. In contrast, in the prior lawsuit,
 17 this court granted a summary judgment of noninfringement, which was eventually
 18 reversed on appeal. Additionally, Tom Smith, an accomplished engineer and
 19 architect of the MakoHead, confirmed that the MakoHead omits elements recited
 20 in the claims of '662 patent. Furthermore, Plaintiffs claims for infringement of the
 21 MakoHead were rejected by the court in the Mako Products bankruptcy.

22 **B. Contentions of Law**

23 As Plaintiffs would not have made any of Defendants' rentals, Plaintiffs are
 24 not entitled to (and have not satisfied their burden to prove) lost profits (or any
 25 other form of damages), even if infringement is found. Additionally, as
 26 Defendants' defenses are objectively reasonable and susceptible to a reasonable
 27 conclusion in favor of Defendants, any infringement is not willful.
 28

1 Respectfully submitted,

2 /s/ Mark J. Young

09-September-2019

3 Mark J. Young

4 (Fla Bar No. 0078158)

Pro Hac Vice

5 Mark Young, P.A.

6 1638 Camden Avenue

Jacksonville, FL 32207

7 Tel.: 904-996-8099

8 Fax: 904-980-9234

Email: myoungpa@gmail.com

9 Attorney for Defendants,

10 Oceanic Production Equipment Ltd. and

11 Jordan Klein Sr.

12 /s/ Ashe Puri

09-September 2019

13 James E. Doroshow (SBN 112,920)

14 Ashe Puri (SBN 297,814)

FOX ROTHSCHILD LLP

15 10250 Constellation Blvd., Suite 900

16 Los Angeles, CA 90067

17 Tel. (310) 598-4150

18 Attorneys for Defendants Oppenheimer Cine Rental, LLC,

19 Oppenheimer Camera Products, Inc., and Marty Oppenheimer